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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the State of Minnesota	)	
for a Declaratory Ruling Regarding the	)	CC Docket No. 98-1
Effect of Sections 253(a), (b) and (c)	)	
of the Telecommunications Act of 1996 on	)	
an Agreement to Install Fiber Optic	)	
Wholesale Transport Capacity in State	)	
Freeway Rights-of-Way	)	
	)	

COMMENTS OF TELEPORT COMMUNICATIONS GROUP INC.

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Dated: March 9, 1998

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SUMMARY

Teleport Communications Group Inc. ("TCG") hereby opposes the Petition by the State of Minnesota requesting the Commission to declare that an exclusive agreement with an entity to install fiber optic wholesale transport capacity over the state freeway rights-of-way is not subject to preemption pursuant to Section 253 of the Communications Act. TCG does not oppose the right and responsibility of any State to manage its rights-of-way and to develop statewide telecommunications infrastructure. Indeed, TCG agrees that a State may enter into contract arrangements that may benefit the State's ability to access lit and dark fiber at an acceptable price. However, it is inappropriate in any context and a violation of Section 253(a) of the Act for a State to grant any entity exclusive access to its rights-of-way.

The State's proposed exclusive access and management of freeway rights-of-way constitutes a prohibition on the provision of telecommunications services in violation of Section 253(a), because it substantially restricts the manner in which a carrier may provide service. The freeway rights-of-way are the only freeways that run directly through the Twin Cities, and there are no adequate substitutes for a carrier that is denied access or whose business plan does not permit it to install facilities concurrently with Developer. Although the State is permitted to manage its rights-of-way under Section 253(c), the instant proposal exceeds the permissible scope of such management authority, because it is discriminatory. The proposed State action also is not a permissible exercise of the State authority to

protect the public safety, because the means employed are not necessary and competitively neutral, as required by Section 253(b).

For these reasons, the Commission should declare that the proposed Minnesota plan to permit a sole entity exclusive access to its freeway rights-of-way violates Section 253(a) of the Communications Act. Such a declaration will not impede the State's ability to contract for telecommunications services or manage its rights-of-way, as long as it does not do so on an exclusive basis.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Sections 253(a), (b) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way	))))))))))	CC Docket No. 98-1

<u>COMMENTS OF TELEPORT COMMUNICATIONS GROUP INC.</u>

Teleport Communications Group Inc. ("TCG") hereby opposes the above-captioned Petition. The State of Minnesota, acting by and through the Minnesota Department of Transportation and the Minnesota Department of Administration (collectively "Minnesota" or the "State"), requests that the Commission declare that an exclusive agreement with an entity to install fiber optic wholesale transport capacity over the state freeway rights-of-way is not subject to preemption pursuant to Section 253 of the Communications Act. This exclusive arrangement, however, substantially restricts a carrier's ability to provide telecommunications services and is not within the State's authority to manage its public rights-of-way pursuant to Section 253. Therefore, the Commission should deny the Petition.

I. INTRODUCTION

TCG does not oppose the right and responsibility of any State to manage its rights-of-way, particularly to protect the public safety and welfare. However, it is inappropriate in any context and a violation of Section 253(a) of the Act for a State to grant exclusive access to its rights-of-way to any entity. This is not management of the rights-of-way, but instead represents a wholesale surrender of a state's obligation under Section 253 to ensure competitively neutral access to those rights-of-way.

The resolution of this issue is critical to the future success of facilities-based competitive local exchange carriers ("CLECs") to develop a nationwide "network of networks," providing competitive and expanded telecommunications services throughout the country. State-by-state, TCG has constructed tens of thousands of miles of fiber optics of telecommunications facilities, and in each state the approach was the same — begin by building facilities around and near large population centers using the most efficient and cost-effective means available. In many cases, this meant building over freeway rights-of-ways.

On July 31, 1997, TCG Minnesota, Inc., a TCG affiliate, received its Certificate of Authority to provide interexchange service in the state of Minnesota and local services in the Twin Cities metropolitan area.[1] If the instant State

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1. Request by TCG Minnesota, Inc. for a Certificate of Authority to Provide Interexchange Services in the State of Minnesota and Local Exchange Services in the Franchise Exchanges of US WEST Communications, Sprint/United Telephone and GTE-Minnesota in the Minneapolis/St. Paul Metropolitan Calling Area, Docket (continued...)

petition is granted, TCG will be unjustifiably relegated to lower grade, less efficient rights-of-way in building and expanding its Minnesota network.[2] However, this is precisely the result that is to be prevented by the Commission's preemption authority under Section 253(d).[3]

The State's proposed exclusive access and management of freeway rights-of-way constitutes a prohibition on the provision of telecommunications services in violation of Section 253(a), because it substantially restricts the manner in which a carrier may provide service. Second, although the State is permitted to manage its rights-of-way under Section 253(c), the instant proposal exceeds the permissible scope of such management authority, because it is discriminatory. In addition, the proposed arrangement is not a permissible exercise of the State's authority to protect the public safety and welfare, because it is not necessary and competitively neutral, as required under Section 253(b). For these reasons, the Commission should declare that the proposed Minnesota plan to permit a sole

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1.(...continued)
No. P-5496-NA-97-508, Order Granting Certificate of Authority with Conditions (issued July 31, 1997).

2. The only availability for any carrier other than Developer to install cable facilities is according to the Developer's own installation schedule. In this regard, carriers virtually have no independent business decision or network strategy options. The concurrent offering of an opportunity to install fiber is so limited as to be useless. See Agreement at Section 1.20(6). Moreover, even if a carrier can have its fiber installed according to the Developer's schedule, it must rely on Developer and Developer's contractors for installation and repair, rather than its own resources.

3. 47 U.S.C. § 253(d).

entity exclusive access to its freeway rights-of-way violates Section 253(a) of the Communications Act.[4]

II. THE PROPOSED ARRANGEMENT IS AN IMPERMISSIBLE INFRINGEMENT ON THE PROVISION OF TELECOMMUNICATIONS SERVICES

Minnesota attempts to distinguish its arrangement for the installation, provisioning, and maintenance of fiber optic transport facilities from the offering of telecommunications services to the public. According to the Petition, its exclusive arrangement does not even raise a Section 253 issue, because it pertains to telecommunications infrastructure rather than the provision of a telecommunications service.[5] However, the ability to provide telecommunications infrastructure without unreasonable restriction is part and parcel of a carrier's ability to provide telecommunications services. Although the State looks to Section 253 and the legislative history of the Telecommunications Act of 1996 to support its position, neither of these sources support the State's theory. Finally, Commission decisions have made clear that the State cannot impose restrictions upon the means by which a carrier chooses to provide telecommunications services.

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4. Id., § 253(a).

5. Petition at 13-17.

A. Section 253(a) Prohibits Restricting the Method by which a Carrier Chooses to Provide Telecommunications Service

Section 253(a) proscribes any local statute or regulation or state or local legal requirement that prohibits or has the effect of prohibiting the ability of any entity to provide an interstate or intrastate telecommunications service.[6] On its face, the provision forbids the State from imposing any restriction on an entity's ability to provide a telecommunications service. Even assuming *arguendo* that the wholesale transport capacity proposed by the State is not a "telecommunications service," limiting the exclusive use and access to freeway rights-of-way to a single entity still substantially restricts the ability of carriers to develop networks and provide telecommunications services and therefore, violates Section 253(a). Carriers' ability to locate and install telecommunications infrastructure is inseparable from the provision of facilities-based telecommunications services, the strong preference for which is reflected in the Communications Act.[7] Facilities-

6. 47 U.S.C. § 253(a).

7. Congress understood that a truly competitive local exchange market will be a reality only when competitors do not have to rely significantly on the facilities and network functionalities of the incumbent LECs to offer service to end-users. Thus, Section 271(c)(1)(A) of the Communications Act requires BOCs to face the presence of a facilities-based competitor before being permitted to offer in-region interLATA services. 47 U.S.C. § 271(c)(1)(A) (qualifying competing service "may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier").

based competitive opportunities must be available to realize this express congressional goal.[8]

In this regard, the legislative history cited by the State does not support its premise that the provisioning of telecommunications infrastructure is clearly distinct from the ability to provide telecommunications services. According to the Minnesota Petition, "[t]he legislative history of the Telecom Act focuses on state and local government actions that impede provision of telecommunications *services*, and not on telecommunications infrastructure."[9] Again, this focus attempts to differentiate the offering of telecommunications service from the carrier's choice of the method by which it will provide the service. If the carrier's choices for providing telecommunications services are limited or curtailed, it effectively could be prohibited from providing the service.

Minnesota cites a string of quotations from the legislative history of the 1996 Act, but none of these support its distinction between telecommunications infrastructure and services. For example, according to one Congressman, a state or local government should not be able to require a carrier to agree to build out all or any part of a territory.[10] Contrary to Petitioner's interpretation, it thus follows that the carrier should be allowed to build-out (or not to build-out) as its individual business plan requires, without imposition by a state or local regulator. In fact, no

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8. See n.2 supra.

9. Petition at 14.

10. Id. at 15 (quoting Statement of Representative Tim Holden (D-PA) dated February 1, 1996).

part of the cited legislative history suggests that infrastructure may be restricted, even though the ability to provide telecommunications services may not.

Indeed, the structure of Section 251 is intended to make available to requesting telecommunications carriers the full panoply of options for offering competitive local exchange services. Section 251 requires incumbent LECs to provide a requesting telecommunications carrier interconnection, access to unbundled network elements, resale, or some combination of these.[11] According to the State's interpretation, however, carriers should be satisfied with the facilities that exist and those that a regulatory authority (the State) allows to be built. This theory is directly contrary to the opening of the telecommunications market to competition. At bottom, the State cannot effectively limit carriers' options for the provision of telecommunications services by foreclosing potentially the most efficient and cost-effective means of constructing a facilities-based network.

B. The Exclusive Arrangement Has the Effect of Prohibiting Facilities-Based Carriers from Providing Telecommunications Services

As TCG has shown, the issue raised by the Minnesota Petition falls squarely within the Section 253 prohibition on the restriction of prohibiting telecommunications service. Specifically, Minnesota's proposed exclusive

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11. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15588 (¶ 172) (1996) (describing the options available for the provision of competitive services), aff'd in part and rev'd in part Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted 66 LW 3490 (U.S. January 26, 1998) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141).

management, installation, and maintenance of a fiber optic transport system using freeway rights-of-way constitutes an impermissible restriction upon the provision of telecommunications services.

1. CLECs Must be Free to Choose How to Provide Services

The Commission has issued several orders applying Section 253(a) of the Act. These orders have made clear that when a state acts to prohibit or dictate the means by which a telecommunications carrier offers telecommunications services, it violates Section 253(a) of the Act and is subject to FCC preemption. For example, the Commission preempted provisions of the Texas Public Utility Regulatory Act of 1995, including provisions that directly restrict the manner in which carriers may enter the telecommunications market. In that case, the Texas legislature affirmatively required certain certified carriers to build-out in their certified territories within a specified timeframe.[12] The Commission determined that the build-out requirements were not competitively neutral, because they singled out a specific certificate holder and directed the means by which they would offer service.[13] Thus, "new entrants should be able to choose whether to resell incumbent LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of the three options."[14]

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12. Public Utility Commission of Texas, CCBPol 96-13, Memorandum Opinion and Order, FCC 97-346 (rel. October 1, 1997) at ¶ 82 ("Texas Preemption").

13. Id. at ¶ 82.

14. Id. at ¶ 74.

Carriers must have available to them the full range of options for the provisioning of service. In the Texas Preemption case, the state had impermissibly restricted a new entrant's method of providing service, contrary to Section 251 and in violation of Section 253(a).[15] The same is true in this case, because a new entrant is prohibited from building facilities along freeway rights-of-way and from using the most-efficient, cost-effective building strategy if its deployment schedule happens to differ from Developer. The contract makes clear that carriers' opportunity to install fiber will be strictly limited.[16]

Because of the circumstances presented by the exclusive contract, Petitioner's reliance on the Commission's Classic Telephone decision is misplaced.[17] In that case, two cities denied a franchise to a specific payphone service provider ("PSP"), while granting a franchise to a similarly-situated PSP. The Commission preempted the absolute prohibition on Classic's competitive entry.[18] Similarly, the Minnesota arrangement, for all practical purposes, has the effect of preventing a carrier from offering a telecommunications service by substantially restricting its exercise of business judgment and network deployment

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15. Id. at ¶ 76.

16. See Agreement at Section 1.20(6).

17. Petition at 17-18.

18. Classic Telephone, Inc. Petition for Pre-emption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13096 (¶ 27) (1996) ("This absolute prohibition on Classic's competitive entry is precisely the type of action Congress intended to proscribe under section 253(a), absent a demonstration that the franchise denials are an exercise of authority specifically reserved to State and local governments under sections 253(b) or 253(c).").

strategies. In this way, the exclusive arrangement has the effect of restricting the placement of facilities essential for the provision of facilities-based telecommunications services so as to constitute a barrier to entry.

The instant petition is also distinguishable from the Huntington Park Payphone decision, in which the Commission declined to preempt a state restriction on the placement of payphones.[19] In that case, all PSPs were restricted from freely placing payphones outdoors on private property in the City business district, but the City was not restricted from contracting at any time with any, and as many, PSPs to provide such service.[20] Nevertheless, the California Payphone Association ("CPA") argued that the City had "implemented the Payphone Agreement in an exclusive manner, making 'illusory' the prospect of contracting with the City to install payphone outdoors on the public rights-of-way" in the designated area;[21] however, the Commission found that the CPA had not provided sufficient evidence to support this contention.[22] Moreover, the Commission noted that the City "is not insistent on contracting only with one PSP

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19. California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, Memorandum Opinion and Order, 12 FCC Rcd 14191 (1997).

20. Id. at 14206-14207 (¶ 34).

21. Id. at 14207 (¶ 35).

22. Id. In addition, the Commission found that no evidence suggested that the alternative payphone locations were insufficient to sustain payphone service in the area. Id. at 14209 (¶¶ 39-40).

for phones in the right-of-way . . . . The City's contract with Pacific Bell is not exclusive . . . ."[23]

In the instant case, the prospect of Minnesota contracting at will with telecommunications provides to install fiber optic transport over the state freeways is not only "illusory," but expressly forbidden for at least a ten year contract term under the current arrangement. Contrary to the Huntington Park Payphone case, Minnesota pursued an exclusive contract with a single developer, a condition which Huntington Park disclaimed. Thus, the Minnesota arrangement restricts access to its valuable freeway rights-of-way with the exception of one entity, to the long term exclusion of all other telecommunications carriers.[24] Thus, the State's proposed contract materially inhibits the ability of any facilities-based competitor "to compete in a fair and balanced legal and regulatory environment."[25]

Based on the FCC's preemption precedent, the Minnesota rights-of-way arrangement violates Section 253(a) in at least two specific ways. First, it is exclusive to one developer. This arrangement excludes any number of telecommunications carriers, particularly facilities-based CLECs, that will only have limited opportunities to decide, plan, and finance the installation of fiber at the

23. Id. at 14208 (¶ 36) (emphasis added).

24. The agreement extends for a ten year term with an option to renew for an additional ten years (Petition, Exhibit 5, Section 11.1), making it unlikely that access by any entity other than Developer would be available in the near future.

25. See Huntington Park Payphone, 12 FCC Rcd at 14206 (¶ 31).

same time chosen by Developer.[26] In fact, a carrier wishing to collocate facilities may do so only "concurrently with construction and installation of the Network."[27] This arrangement is unacceptable because it imposes artificial network planning, in terms of timing and investment, just like the Texas build-out provision that the FCC preempted.

Second, the arrangement permits access only to the Developer and its own maintenance and operation contractors "for the purposes of operating, administering, maintaining, repairing and replacing . . . the fiber cable and equipment of Collocating Customers."[28] This represents yet another means by which the agreement infringes upon a carrier's provision of telecommunications service, because even a collocating carrier is prohibited from managing and essentially overseeing the maintenance and repair of its own facilities. In addition to the practical problems posed by such an arrangement — for example, the possibility that Developer or its contractors may not be familiar with TCG equipment — other insurmountable difficulties exist. Access to TCG equipment by non-TCG personnel could conceivably void equipment warranties and also may invalidate the proprietary and confidential nature of TCG's network.

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26. See Petition at 3, 10.

27. Id. at Exhibit 5, Section 7.4(a)(i).

28. Id. at Exhibit 5, Agreement at Sections 7.1 and 7.4(a)(ii); see also Agreement at Section 3.1(b)(vii).

Moreover, the Agreement does not clearly address important considerations such as which party selects the quality and manufacturer of collocated fiber, the allocation of that fiber, or the selection of facilities placed at the ends of the fiber. Indeed, the collocator's use of its own fiber appears to be in jeopardy of state acquisition.[29]

2. The Exclusive Arrangement Imposes Additional Costs and Inefficiencies on Competitors

The exclusive arrangement contemplated by the State imposes additional costs and inefficiencies upon alternative providers of competitive local services that also have the effect of prohibiting the provision of telecommunications services. State requirements may not deter the entry of potential competitors into the telecommunications services market by raising the costs and burdens of providing service.[30] In the New England Payphone decision, the Connecticut Department of Public Utility Control required any payphone provider to obtain a local exchange carrier certification prior to offering payphone services. This requirement did not have the effect of excluding any specific carriers as in the Classic Telephone case, but it imposed an unacceptable additional condition upon the provision of service.

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29. See Agreement at Section 3.1(b)(viii) and Section 3.3(k).

30. New England Public Communications Council Petition for Preemption Pursuant to Section 253, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19721 (¶ 20) (1996) ("New England Payphone"), pet. for recon. denied 12 FCC Rcd 5215 (1997).

An arbitrary increase in the cost of providing telecommunications services is one of the primary objections to the exclusive arrangement contemplated by the state of Minnesota. It is efficient for a telecommunications carrier to manage and maintain its own facilities.[31] Such a practice permits the carrier to monitor and control its network expenditures, which the Commission has previously found to be cost-effective for the carrier.[32] In the Expanded Interconnection proceeding, the record demonstrated that "interconnectors' ability to monitor and control the electronic equipment" facilitates competition and "permits the company to maintain its quality and reliability standards, and assists in controlling costs."[33] Under the Minnesota arrangement, however, carriers are denied these efficiencies.

Petitioner's exclusive arrangement as presented has the effect of prohibiting the provision of telecommunications service by facilities-based CLECs. The exclusive arrangement restricts the access and use of freeway rights-of-way, contrary to the Section 253, Commission precedent, and public policy. Telecommunications carriers must have available options for the provision of telecommunications services, and the exclusive arrangement not only restricts the

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31. Carriers should be able to exercise business judgement as to when, where, how, and whether to construct facilities. The proposed agreement severely limits this discretion.

32. The FCC initially mandated physical collocation because it "best ensures that [competitors] are provided interconnection on the same terms and conditions as the LECs . . . ." Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7389 (¶ 39) (1992) (case history omitted).

33. Id. (¶ 38).

timing and means by which facilities may be installed, but also imposes additional costs on those carriers that only are able to have facilities installed in the brief window of opportunities offered by Developer. Such an arrangement has the effect of prohibiting a facilities-based carrier from providing intrastate or interstate service in violation of Section 253(a) of the Act.

III. THE STATE'S PROPOSAL DOES NOT FALL WITHIN ITS PERMISSIBLE MANAGEMENT OF RIGHTS-OF-WAY OR PROTECTION OF PUBLIC SAFETY AND WELFARE

The exclusive rights-of-way agreement presents a clear violation of Section 253(a). Such a restriction on the provision of telecommunications services may be permitted, however, where a state or local authority demonstrates that its prohibition is necessary to protect the public safety and welfare and is competitively neutral (Section 253(b)) or exercises its authority to manage public rights-of-way on a nondiscriminatory basis (Section 253(c)). In the instant Petition, the exclusive arrangement is neither necessary and competitively neutral, nor nondiscriminatory, because it impedes the development of facilities-based competition and provides lower quality alternatives for telecommunications carriers.

A. The Exclusive Arrangement Impedes the Development of Competing Networks and Is Discriminatory in Violation of Section 253(c)

The Minnesota Petition attempts to minimize the impact of its exclusive arrangement for fiber optic transport facilities on its freeway rights-of-way by suggesting that access will be provided on a nondiscriminatory basis to any requesting carrier according to contractual terms[34] and that Developer presumably will not be acting as a common carrier.[35] However, because Developer would not be subject to regulatory oversight, any "nondiscriminatory" practice and pricing terms are not buttressed by regulatory enforcement. For example, the agreement requires "uniform and nondiscriminatory rates and charges for use of or access to . . . [the] fiber optic cable" for "similarly situated customers and potential customers."[36] Developer has the sole discretion to determine which customers are "similarly situated" according to "commercially reasonable considerations and distinctions." In addition, these terms do not govern the rate level that Developer may charge, even if it does so on a nondiscriminatory basis.[37] This standard easily could be unintentionally or intentionally misapplied to the detriment of telecommunications providers. Indeed, non-common carrier status permits a provider to contract with customers on an individual basis and offer varying pricing terms.[38] The discretion to be exercised by Developer in installing facilities and offering capacity on those facilities seriously compromises Petitioner's position that the arrangement is consistent with Section 253(c).

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34. Petition at 25-26.

35. See id. at 14.

36. Id. at Exhibit 5, Section 7.7(a).

37. See Agreement at Section 1.20 and Section 7.7(a).

38. See, e.g., Tel-Optik Limited; Application for a licenses to land and operate in the United States a submarine cable extending between the United States and the United Kingdom, Memorandum Opinion and Order, 100 FCC 2d 1033, 1052 (1985).

In addition, the competitors are limited to a narrow window of opportunity to have their facilities placed in the conduit.[39] The effect is to favor those carriers whose business decisions regarding network deployment and resource availability coincide with the Developer's designated plan for installing facilities. Thus, the limited window of opportunity for "nondiscriminatory" installation discriminates against facilities-based CLECs in favor of incumbent local exchange carriers and interexchange carriers with mature networks. Such a restriction on the placement of facilities also unfairly discriminates against facilities-based telecommunications carriers, as opposed to those that provide services through resale. This is an impermissible "prohibition on competitive entry against a particular class of potential competitors" which "is inconsistent with the pro-competitive policies of the 1996 Act."[40]

Finally, none of the "competing" networks cited are provided by CLECs. The only "mature" networks are offered by the incumbent LECs and IXCs. These networks do not always make available the facilities necessary for CLECs to provide efficient competitive local service. Even the limited CLEC facilities cited by Petitioner,[41] involve limited CLEC facilities that have had to route their fiber facilities without the convenience of access to freeway rights-of-way. In addition,

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39. "As previously noted, installation of non-network capacity must occur at the same time as installation of network capacity to avoid unnecessary intrusion on freeway rights-of-way." Petition at 26 n.20.

40. <u>See</u> <u>New England Payphone Order</u>, 11 FCC Rcd at 19721 (¶ 18).

41. Petition at 23.

none of the networks constructed by small incumbent LECs are located in the area in question, Minneapolis and St. Paul. Although these networks may provide some alternatives, they certainly are not a substitute for access to the freeway rights-of-way.

B. Exclusive Access Is Not a "Necessary" and "Competitively Neutral" Means to Protect the Public Safety and Welfare as Required Under Section 253(b)

The State also fails to support its claim that the exclusive arrangement is "necessary" to "protect the public safety or welfare" under Section 253(b).[42] According to the Petition, this is a "take it or leave it" proposition in terms of making available its freeway rights-of way, such that "[t]he alternative to single-party exclusive access is no access at all."[43] The State claims that non-exclusive access to the freeway rights-of-way presents an unacceptable compromise of public safety and convenience; however, it has chosen the most restrictive means available to protect the public safety while opening the freeway rights-of-way for use. The Commission rejected a similar argument in the New England Payphone decision that the Connecticut Department of Utility Control's flat prohibition against non-LEC provision of payphone service in the state was "necessary" to "protect the public safety or welfare" under Section 253(b).[44]

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42. See 47 U.S.C. § 253(b); Petition at 26-28.

43. Petition at 8.

44. See New England Payphone, 11 FCC Rcd at 19722 (¶¶ 21-22).

Attempting to support its "competitive neutrality" claim, Minnesota characterizes the state trunk highway rights-of-way as a suitable alternative to the freeway rights-of-ways. Yet, the state highways are in many ways inferior to the freeways. The state trunk highways do not have a direct route to St. Paul or Minneapolis, imposing additional costs upon facilities-based carriers. Similarly, the state trunk highway rights-of-ways are of a lower grade than the freeways. Perhaps most importantly, there is no parallel to an exclusive contract for freeway rights-of-way. The holder of such an exclusive arrangement has no obligation to obtain individual permits for construction, nor does it have to "compete" with other potential permittees. The advantages to be gained by exclusive and unfettered access to the freeway rights-of-way are numerous and substantial, particularly for ten year periods.[45]

At bottom, the State has failed to explain why it is capable of managing the state trunk highway rights-of-way, but it must have an exclusive arrangement for the freeways.[46] Because of the real alternative to exclusive use — the State's management of its freeway rights-of-ways as it does for other rights-of-ways — Minnesota has not shown that its has selected the least restrictive means of exercising its authority to protect the public safety and welfare.

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45. Petition at 11 (citing Exhibit 5, Section 11.1).

46. In fact, the state already has set forth a detailed state trunk highway rights-of-way policy. <u>See</u> Agreement at Exhibit H.

IV. CONCLUSION

TCG acknowledges that states have a right and duty to manage their right-of-way. However, exclusive arrangements for doing so that also include exclusive access for the installation of telecommunications facilities are impermissible under Section 253(a) of the Act. Such an arrangement cannot be justified under Sections 253(b) and 253(c), because the arrangement is not necessary to protect the public safety and is not competitively neutral, and it is discriminatory. The State has demonstrated that it is possible to maintain public rights-of-way on its state trunk highway system without an exclusive arrangement, and it must implement the same procedures to provide access to its freeway rights-of-ways.

For these reasons, the Commission should deny the Minnesota Petition and declare that exclusive rights-of-way arrangements violate Section 253(a) and are not otherwise permitted under Sections 253(b) and 253(c).

Respectfully submitted,

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Dated: March 9, 1998

CERTIFICATE OF SERVICE

I, Dottie E. Holman, do hereby certify that a copy of the foregoing Comments of Teleport Communications Group was sent by hand-delivery and first-class mail, postage pre-paid, as indicated, this 9th day of March, 1998, to the following:

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